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Note: The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation

In recent years the legal profession has received criticism with increasing frequency. Demands for change in the profession's ethical code¹ and economic structure² and for improvement in the quality and availability of legal services³ have proliferated. Response to these demands may come from several different sources. The organized bar itself has reacted to public pressure and moved to "internally" correct its problems.⁴ The federal government, although its involvement in this area is of recent origin, may become a significant source of corrective

1. See, e.g., Shuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 GEO. WASH. L. REV. 244 (1968); Comment, *Legal Ethics and Professionalism*, 79 YALE L.J. 1179 (1970). The rules forbidding attorney advertising have been under especially heavy attack, on the ground that they impinge upon the public's first amendment right to information concerning access to legal representation, see Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181 (1972), and on the ground that they violate the antitrust laws, see note 2 *infra*. The restrictions may soon be eased. See note 4 *infra*.

2. See, e.g., 1 M. GREEN, *THE CLOSED ENTERPRISE SYSTEM* 534-40 (1971). Green suggests that the legal profession is noncompetitive because of such artificial barriers to competition as advertising restrictions, see note 1 *supra*, and, until recently, minimum fee schedules. The latter were recently struck down on antitrust grounds, *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and the advertising canons have been challenged on the same ground. *Person v. Association of the Bar*, Civil No. 75C 987 (E.D.N.Y., filed June 23, 1975); *Consumers' Union v. American Bar Ass'n*, Civil No. 75-0105-R (E.D. Va., filed Feb. 27, 1975).

3. See generally B. CHRISTENSEN, *LAWYERS FOR PEOPLE OF MODERATE MEANS: SOME PROBLEMS OF AVAILABILITY OF LEGAL SERVICES* (1970). Christensen, along with many other commentators, argues that there is a large need for legal services among people of moderate means. He proposes various solutions for the problem, including more effective use of nonprofessional personnel, specialization, larger law practices, financial subsidies, legal service financing plans, and group legal services.

4. The American Bar Association (ABA), for example, recently voted to liberalize its ethical restrictions on advertising. See *Code Amendments Broaden Information Lawyers May Provide in Law Lists, Directories, and Yellow Pages*, 62 A.B.A.J. 309 (1976). Although the ABA's action does not bind state bars, they are likely to follow its lead. Schroeder, *ABA Takes Action on Advertising and Bankruptcy Legislation*, 44 HENNEPIN LAWYER 7 (March-April 1976). It has been argued that responsible self-regulation by the organized bar is the best approach to meeting major problems within the profession. Brink, *Who Will Regulate the Bar?*, 61 A.B.A.J. 936 (1975).

action.⁵ Finally, the states may regulate attorneys within their respective jurisdictions. State regulation involves a complicating factor, however, for a fundamental constitutional question may arise: what is the proper relationship between the legislative and judicial branches of government in regulating the legal profession and the practice of law?⁶

The issue is not a novel one, but its appropriate resolution is still far from clear. Judicial regulation of the legal profession has predominated for many years. Yet legislative regulation of the profession has existed concomitantly, and the boundary between the two prerogatives has remained remarkably ill defined.⁷

Courts have premised their power to regulate on the concept of "inherent" judicial power. Inherent judicial powers are those not expressly granted by constitution but said to arise from the very existence of the judiciary as an independent branch of government. The constitutional creation of a "court"

5. See *Hearing on the Organized Bar: Self-Serving or Serving the Public? Before the Subcomm. on the Representation of Citizen Interests of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974); Tunney & Frank, *Federal Roles in Lawyer Reform*, 27 STAN. L. REV. 333 (1975). Tunney and Frank suggest that the federal government could change restrictive bar association rules, subsidize legal services programs, reduce costs by restricting legal fees, and require *pro bono* activities from attorneys as a condition to their admission to federal practice. The Justice Department has already been effective in bringing about changes in ABA rules on group legal services. *Justice Department Continues Its Contentions that the Houston Amendments Raise Serious Antitrust Problems*, 60 A.B.A.J. 1410 (1974); *House of Delegates Has Midyear Meeting in Chicago*, 61 A.B.A.J. 463 (1975).

6. In more than half the states, the legal profession is regulated by integrated bar associations. Under these systems all attorneys are required to be members of the state bar, which promulgates rules and conducts disciplinary activities under the ultimate supervision of the state supreme court. Some of these systems have been set up by statute and some by court rule. See J. PARNISS, *CITATIONS AND BIBLIOGRAPHY ON THE UNITED BAR IN THE UNITED STATES* (1973); Winters, *The Integrated Bar in the United States*, 62 L. SOC'YS GAZETTE 219 (1965). Integrated bar associations may be viewed as arms of the judicial branch, as creatures of the legislature, or as a mixture of both. Compare *In re Schatz*, 80 Wash. 2d 604, 607, 497 P.2d 153, 155 (1972) (majority opinion) with *id.* at 618-19, 497 P.2d at 161 (dissenting opinion).

7. See text accompanying notes 70-76 *infra*. See generally Green, *The Courts' Power Over Admission and Disbarment*, 4 TEXAS L. REV. 1 (1925); Shanfeld, *The Scope of Judicial Independence of the Legislature in Matters of Procedure and Control of the Bar*, 19 ST. LOUIS L. REV. 163, 170 (1934); Note, *Admission to the Bar and the Separation of Powers*, 7 UTAH L. REV. 82 (1960); Comment, *Separation of Powers: Who Should Control the Bar?*, 47 J. URBAN L. 715 (1969).

implies that it must have the incidental powers necessary to its dignity, functioning, and survival.⁸ Under this theory the courts have claimed the power to punish for contempt,⁹ to promulgate rules of practice and procedure,¹⁰ to control certain nonadjudicatory administrative matters,¹¹ to admit, supervise, and disbar attorneys¹² and generally regulate the practice of law.¹³ The theory with regard to regulation of attorneys is that, because they are officers of the court whose activities are crucial to the court's operation, their qualifications and conduct must be subject to the control of the court.

The theory of inherent judicial powers is inextricably bound up with that of separation of powers. The latter is a fundamen-

8. Dowling, *The Inherent Power of the Judiciary*, 21 A.B.A.J. 635, 636 (1935). Inherent power has also been termed "implied," "incidental," or "necessary," and for the most part the terms are used interchangeably. Courts have, however, occasionally distinguished the terms depending on the scope and source of the power being exercised. Compare *State v. Cannon*, 196 Wis. 534, 221 N.W. 603 (1928) (majority opinion) with *id.* at 536, 221 N.W. at 605 (dissenting opinion). But these distinctions have been characterized as a matter of nomenclature and not of substance. *In re Cannon*, 206 Wis. 374, 393, 240 N.W. 441, 449 (1932).

9. *Hale v. State*, 55 Ohio St. 210, 45 N.E. 199 (1896).

10. Control over practice and procedure has long been exercised concurrently by the legislature and the judiciary, with ultimate authority generally conceded to the legislature. Courts have, however, stated that the power to prescribe such rules is an "inherent" power. *Lancaster v. Waukegan & Sw. Ry.*, 132 Ill. 492, 24 N.E. 629 (1890) (dictum). Constitutional allocation of this power between court and legislature varies a great deal among the states. Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1 (1958).

11. *Smith v. Miller*, 153 Colo. 35, 384 P.2d 738 (1963) (salaries of clerical help); *Noble County Council v. State ex rel. Fifer*, 234 Ind. 172, 125 N.E.2d 709 (1955) (hiring and salary of probation officer); *Stowell v. Jackson County Supervisors*, 57 Mich. 31, 23 N.W. 557 (1885) (board and lodging for jurors); *Commonwealth ex rel. Carroll v. Tate*, 442 Pa. 45, 274 A.2d 193, cert. denied, 402 U.S. 974 (1971) (compelling addition of money to judicial budget); *In re Court Room and Offices of Circuit Court*, 148 Wis. 109, 134 N.W. 490 (1912) (adequate quarters).

12. *In re Greathouse*, 189 Minn. 51, 248 N.W. 735 (1933). For a discussion of *Greathouse* see text accompanying notes 31-39 *infra*.

13. The "practice of law" is an imprecise but frequently used "term of art." Generally the power to regulate the practice of law means not only the power to regulate bona fide practitioners, but the power to define law practice. For example, the power has been used to justify prohibiting lay persons from representing others before a state compensation board although such practice was authorized by the board pursuant to statutory authority. *West Virginia State Bar v. Earley*, 144 W. Va. 504, 109 S.E.2d 420 (1959). See generally Comment, *Control of the Unauthorized Practice of Law: Scope of Inherent Judicial Power*, 28 U. CHI. L. REV. 162 (1960).

tal premise of American state and federal governments.¹⁴ Governmental power is divided among three branches, the executive, legislative, and judicial. Pure separation theory contemplates that each branch will perform distinct functions and not encroach upon the domain of the others.¹⁵ This has been modified in American practice by the complementary theory of checks and balances, in which the powers of government are blended, each branch exerting direct but limited control over the other two.¹⁶ Such controls include legislative power to impeach the executive and members of the judiciary,¹⁷ executive power to veto legislation,¹⁸ and judicial power to exercise final review.¹⁹ The ultimate goal of this system of independent, balanced branches is to ensure against the undue concentration of power in any single department.

The connection between the doctrines of separation of powers and inherent judicial powers in delineating the roles of the legislature and the judiciary in regulating the practice of law is a confusing one. If the power to regulate attorneys is necessary to the functioning of the courts, it is an "inherent" judicial power. But even if it is "inherently" judicial, the question

14. The United States Constitution and all state constitutions provide for vesting the powers of government in separate and distinct departments. Thirty-six states further prohibit the separate departments from exercising each other's powers. R. DISHMAN, *STATE CONSTITUTIONS: THE SHAPE OF THE DOCUMENT* 6-7 (rev. ed. 1968). The Minnesota Constitution is typical:

The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.

MINN. CONST. art. III, § 1.

15. See, e.g., M. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 13 (1967). Vile points out that few writers on the subject define exactly what they mean by "separation of powers" and that any definition of a "pure" doctrine is somewhat arbitrary. *Id.* at 12.

16. *Id.* at 18.

17. See, e.g., MINN. CONST. art. VIII.

18. See, e.g., *id.* art. IV, § 23.

19. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), firmly established judicial review in the federal system, and various states also recognize it, although it may be an "inferential" rather than an express power. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). Professional debate on the origin and legitimacy of judicial review under the federal constitution continues. See R. BERGER, *CONGRESS V. THE SUPREME COURT* (1969); L. HAND, *THE BILL OF RIGHTS* (1958); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

arises whether separation of powers theory requires that it be exclusively or predominantly entrusted to the judicial branch.

The courts' search for an answer to this question is understandably marked by ambiguous and confusing decisions, for determining the proper relationship between two coordinate branches of government, even in a fairly narrow area such as this, is at once a delicate and momentous task, and it involves a confrontation that courts hesitate to undertake.²⁰ The Supreme Court of Minnesota faced this task in a recent case, *Sharood v. Hatfield*,²¹ involving a challenge to the constitutionality of a statute²² that conflicted with certain court rules governing the legal profession. The court held the statute unconstitutional and in so doing sharply delineated the legislative-judicial relationship by simply denying any legislative power to govern the field.²³

The Minnesota supreme court's conclusion that it has exclusive power to regulate the practice of law is difficult to characterize as a minority or majority position, relative to other states, due to the elusiveness of judicial opinions on this subject. Nevertheless, because *Sharood v. Hatfield* is a recent expression by a state supreme court about the relationship of the inherent power doctrine to regulation of the legal profession, it is an appropriate vehicle for examination of the doctrine in that context. This Note will first review the development of the Minnesota court's present position. It will then suggest an alternative approach for determining the relationship of judicial and legislative power in this area; one that seems to better comport with the relevant constitutional doctrines and policy considerations.

I. REGULATION OF THE PRACTICE OF LAW IN MINNESOTA

Early regulation of the legal profession in Minnesota was characterized by concurrent legislative and judicial control.²⁴

20. See text accompanying notes 70-76 *infra*. See also Comment, *Separation of Powers: Who Should Control the Bar?* 47 J. URBAN L. 715 (1969).

21. 296 Minn. 416, 210 N.W.2d 275 (1973).

22. Minn. Laws 1973, ch. 638. See notes 48-55 *infra* and accompanying text.

23. See text accompanying notes 47-63 *infra*.

24. Concurrent control also characterized early regulation of the profession in other states. See, e.g., *Brydonjack v. State Bar*, 208 Cal. 439, 443-45, 281 P. 1018, 1020 (1929); *Clark v. Austin*, 340 Mo. 467, 101 S.W.2d 977 (1937); Green, *The Court's Power Over Admission and Dis-*

Statutes prescribed procedural requirements for admission and disbarment and set out substantive offenses meriting the latter,²⁵ but did not otherwise limit the state supreme court's exercise of discretion in individual cases. Similarly, statutory law created a board of examiners to administer the bar examination but authorized the court to appoint the board and to accept or reject board recommendations on applicants.²⁶ For many years there was no apparent need to clarify whether the powers being exercised in regulating the profession were "judicial" or "legislative" or whether one branch was intruding upon the functions of the other.²⁷ While the Minnesota court never expressly recognized the validity of legislative regulation, it grounded disbarments upon statutory enactments;²⁸ utilized procedures set up by

barment, 4 TEXAS L. REV. 1 (1925). English common-law practice also involved both legislative and judicial control of attorneys. However, English and colonial practice are of limited utility in delineating the proper roles of the judiciary and legislature under a separation of powers system, since the relationship of the two branches under such a system is quite different theoretically than under a parliamentary government. Dowling, *Inherent Power of the Judiciary*, 21 A.B.A.J. 635, 638 (1935). For contrasting views of the significance of common-law practice, compare *In re Day*, 18 Ill. 73, 54 N.E. 646 (1899) with *In re Cooper*, 22 N.Y. 67 (1860).

25. MINN. REV. ST. (Terr.) ch. 93 (1851). For example, an attorney could be removed for conviction of a felony, for deceit or willful misconduct in his profession, or for willful disobedience of a court order. *Id.* § 19.

26. Minn. Laws 1891, ch. 36. This statute did not set out requirements for the bar test, but did require the court to admit graduates of the University of Minnesota Law School by diploma privilege.

27. An early federal case that arose in Minnesota tangentially raised this question and has been frequently cited as authority for the proposition that admission and disbarment are exclusively judicial acts. Secombe sought a writ of mandamus from the United States Supreme Court to set aside a disbarment order of the Supreme Court of the Territory of Minnesota. He contended that the court had not acted in accordance with a territorial statute setting out, in general terms, the procedures and grounds for disbarment. The United States Supreme Court denied the writ, grounding its decision on the fact that the statute authorized the Minnesota court to exercise judicial discretion in determining what constituted a violation of the law sufficient to justify disbarment. The Court noted in passing that the power to admit and disbar in common-law courts rested "exclusively with the court." *Ex parte Secombe*, 60 U.S. (19 How.) 9, 13 (1857). Although the court discussed the exclusivity of judicial power to disbar at common law, it held that the statute at issue authorized the Minnesota court to exercise its discretion. It is curious, then, that the opinion came to be cited for the proposition that admission and disbarment are exclusively judicial functions. See, e.g., *In re Greathouse*, 189 Minn. 51, 59, 248 N.W. 735, 739 (1933) (quoting *State v. Cannon*, 196 Wis. 534, 540, 221 N.W. 603, 605 (1928)).

28. E.g., *In re Arctander*, 26 Minn. 25, 1 N.W. 43 (1879).

the legislature for disciplinary actions;²⁹ and complied with the statute of limitations placed upon disbarment proceedings.³⁰

In 1933 the Minnesota court first used the doctrine of inherent judicial power to justify a particular disbarment for which there was no statutory authorization. *In re Greathouse*³¹ was a disbarment proceeding against a Minneapolis attorney who had employed other attorneys to solicitate business for him. This practice was not prohibited by statute³² and was fairly common;³³ the fault attributed to Greathouse was neither breach of duty to his clients nor moral turpitude, the usual grounds for disbarment, but rather "unethical conduct."³⁴ Since no statutory authority for disciplining an attorney for this offense existed, the court grounded its decision upon its own inherent power to control the practice of law, stating:

The judicial power of this court has its origin in the constitution; but when the court came into existence it came with inherent powers. Such power is the right to protect itself, to enable it to administer justice whether any previous form of remedy has been granted or not.³⁵

29. *Southworth v. Bearnes*, 88 Minn. 31, 92 N.W. 466 (1902).

30. *In re Buck*, 171 Minn. 352, 214 N.W. 662 (1927). There, the court specifically cited the statute as barring certain charges against an attorney in a disbarment proceeding, and clearly considered itself bound by the limitation. *Id.* at 353, 214 N.W. at 662-63. See also *In re Friedman*, 183 Minn. 350, 236 N.W. 703 (1931) (the court declined to hear the issue of the constitutionality of the statute of limitations). But see notes 40-42 *infra* and accompanying text.

31. 189 Minn. 51, 248 N.W. 735 (1933).

32. Attorneys were prohibited by statute from employing lay solicitors. MINN. STAT. § 481.03 (1974) (originally enacted as Minn. Laws 1929, ch. 289, § 1). The issue in *Greathouse* was whether attorneys could personally solicit business or employ other attorneys to do so, questions not addressed by the statute.

33. 189 Minn. at 61, 64, 248 N.W. at 739-40. *Greathouse* was decided during the era of the bar's "national drive" against ambulance chasers. Extensive attorney solicitation systems were viewed with outrage as a violation of legal ethics and a great injustice to the victims of accidents. There was great pressure for reform from the organized bar, and reformers turned both to the courts and the legislatures. See generally *Nation-wide War on "Ambulance Chasers"*, 14 A.B.A.J. 561 (1928). The *Greathouse* opinion suggests another reason for the drive against solicitation: "The lawyer agents of such soliciting system as here involved invade the remote sections of the state and sell their employer's services in the territory which geographically belongs to local attorneys . . . Such conduct . . . leads to underbidding." 189 Minn. at 61, 248 N.W. at 740. Some recent commentary tends to favor solicitation, at least in the form of advertising. See, e.g., Comment, *Solicitation by the Second Oldest Profession: Attorneys and Advertising*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 77 (1973); Comment, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U. CHI. L. REV. 674 (1958).

34. 189 Minn. at 53, 248 N.W. at 736-37.

35. *Id.* at 55, 248 N.W. at 737.

The court specifically based its power to control attorneys on the rationale that attorneys are officers of the court, vital to the administration of justice:

The principal purpose of disbaring attorneys is for the protection of the public and to maintain a standard of administration of justice that will at all times inspire . . . confidence and respect. The court has the power to discipline attorneys on the grounds of self-protection, outside of the common law and outside of the statutory law, in cases where they have so conducted themselves as to impair the administration of justice. . . . This power is possessed by all courts which have authority to admit attorneys to practice.³⁶

The chief significance of the *Greathouse* decision was the court's identification of its power to disbar as an inherent rather than statutorily granted power, for this laid the foundation for expansive exercise of judicial power in other areas where no "enabling" legislation existed. The court later held, for example, that it had the inherent power to enjoin nonforensic lay practice³⁷ and to make rules and regulations governing the administrative structure of the bar.³⁸

None of these cases, however, passed directly on the relationship between judicial and legislative regulation of the practice of law, for in each case the court was defining its power in the absence of conflicting legislation. Strong dicta in *Greathouse*, however, indicated that the power to admit and disbar was exclusively judicial, and that judicial adherence to statutory regulation of those subjects was a matter of courtesy rather than an acknowledgment of legislative power.

Under our form of government, where the judicial constitutes an independent branch, the character of [attorneys] should be of the court's choosing and under the supervision of the court, and other branches of the government should not be permitted to embarrass or frustrate judicial functions by the intrusion of incompetent or improper officers upon the courts. Courts will defer to reasonable legislative regulation, but this deference is

36. *Id.* at 60-61, 248 N.W. at 739.

37. *Fitchette v. Taylor*, 191 Minn. 582, 254 N.W. 910 (1934) (enjoining claims adjuster from practicing law). "Having the power through disciplinary proceedings to protect the public by preventing attorneys from indulging in the unlawful practice of law . . ., it would be anomalous if we had no similar power to protect the public from the illegal practice of law by laymen." *Id.* at 585, 254 N.W. at 911.

38. *In re* Petition for Integration of the Bar, 216 Minn. 195, 12 N.W.2d 515 (1943). The court stated that it had the power to order the creation of a statewide bar association with mandatory membership for all attorneys, but it postponed doing so because so many attorneys were absent from the state due to World War II, and in fact never did so. *In re* Integration of the Bar, 226 Minn. 578, 34 N.W.2d 157 (1948).

one of comity or courtesy rather than an acknowledgement of power.³⁹

The court first struck down a legislative enactment as unconstitutionally interfering with its power to regulate attorneys in *In re Tracy*,⁴⁰ which invalidated the statute of limitations governing disbarment proceedings.⁴¹ While the court implied that the legislature lacked the power to enact *any* valid regulations concerning admission and disbarment, it based its decision on the narrower ground that the statute unreasonably interfered with judicial discretion to consider evidence of misconduct in a disbarment proceeding.⁴² In *Cowern v. Nelson*,⁴³ the court, by purporting to accept legislative policy through "comity," implied even more strongly that its power to regulate the practice of law was exclusive. The defendant, a real estate broker who had been enjoined from drafting conveyances, did not contend that the legislature had the power to permit lay practice of law. Rather, he requested the court to recognize the policy underlying a statute that prohibited lay practice generally but exempted his particular activities. The court adopted this argument, choosing to "defer to the legislative regulation as a declaration of public policy in harmony with the expression of the courts in general, and as a legislative effort to cooperate with and implement the efforts of the courts in the enforcement of that policy."⁴⁴ Without explaining the distinction, however, the court refused to accept the statutory exemption permitting brokers to charge fees for drafting legal documents.⁴⁵ The comity doctrine thus al-

39. *In re Greathouse*, 189 Minn. 51, 59, 248 N.W. 735, 739 (1933) (quoting *State v. Cannon*, 196 Wis. 534, 540, 221 N.W. 603, 605 (1928)).

40. 197 Minn. 35, 266 N.W. 88 (1936).

41. The statute, Minn. Laws 1921, ch. 334, was substantially the same statute at issue in earlier cases. See note 30 *supra*.

42. The court noted that authorities supporting the proposition that disbarment is a judicial act could be divided into two classes: those holding that the legislature may prescribe minimum qualifications for admission and grounds for disbarment, and those denying the legislature's power to regulate the subject in any way. The court identified its own position with the latter, 197 Minn. at 45, 266 N.W. at 93, but its holding actually rested on the following grounds:

[T]he statute in question is not only one of attempted limitation but also, and even more importantly, a rule of evidence. . . . Our inquiry is into . . . professional conduct [W]hat the legislature inadvertently has attempted is to declare that we cannot consider as evidence any conduct of an attorney except such as has occurred within the stated and rather short periods.

Id. at 46, 266 N.W. at 93.

43. 207 Minn. 642, 290 N.W. 795 (1940).

44. *Id.* at 646, 290 N.W. at 797.

45. *Id.* at 647, 290 N.W. at 797.

lowed the court to accept or reject the statutory provisions as it chose, for whatever reasons, whether or not expressed. Later decisions cited *Cowern* as having rejected as unconstitutional statutes "attempting to authorize admissions to the bar by legislative enactment."⁴⁶

In *Sharood v. Hatfield*,⁴⁷ the court explicitly held a statute unconstitutional on the sole ground that the legislature lacked the power to regulate the practice of law. Moreover, although indicating that the comity doctrine still applied, the court ignored an obvious opportunity to employ it, thus suggesting that the court no longer perceives any practical or theoretical reason for deferring to the legislature in this context. The statute at issue revised the manner in which all occupations licensed by the state, including the legal profession, are regulated.⁴⁸ Provisions of the statute transferred a special fund, previously established by statute for attorney registration fees,⁴⁹ to the general revenue fund;⁵⁰ replaced a standing appropriation with a general appropriation to finance bar examinations and disciplinary activities;⁵¹ changed the size and composition of a court-appointed attorney disciplinary board previously created by court rule;⁵² permitted

46. *In re* Petition for Integration of the Bar, 216 Minn. 195, 200, 12 N.W.2d 515, 518 (1943). See also *Sharood v. Hatfield*, 296 Minn. 416, 424, 210 N.W.2d 275, 280 (1973) (statutes "attempting to regulate the practice of law" are unconstitutional). The court's opposition did not require it to reject all legislative assistance in carrying out its functions, and it continued to rely upon statutory provisions. See *In re MacDonald*, 204 Minn. 61, 282 N.W. 677 (1938) (Board of Law Examiners). Moreover, it should be noted that although the logical extension of the inherent power doctrine reached in *Sharood*, see text accompanying notes 47-63 *infra*, suggests that no legislation dealing with the legal profession can have any force or effect, as a practical matter many statutes dealing with attorney conduct remain effective and as yet unchallenged. See, e.g., MINN. STAT. § 481.13 (1974) (attorney's lien); *id.* ch. 319A (professional corporations).

47. 296 Minn. 416, 210 N.W.2d 275 (1973).

48. Minn. Laws 1973, ch. 638.

49. Prior to 1961, funds for bar examinations and disciplinary activities came out of general tax funds and bar association contributions. In that year the court decided that this financing method was inappropriate and by court rule set up a special fund to replace it. Rules Regarding Registration of Attorneys, 260 Minn. vii (1961). A statute was later passed to permit deposit of the fees in the state treasury in a dedicated fund with a standing annual appropriation to the court. MINN. STAT. § 481.01 (1974).

50. Minn. Laws 1973, ch. 638, § 59.

51. *Id.*

52. *Id.* § 60. The board had been set up by court rule in 1970, MINNESOTA SUPREME COURT RULES ON PROFESSIONAL RESPONSIBILITY, to replace an earlier scheme that utilized the Board of Law Examiners,

the use of national standardized tests for bar examinations;⁵³ and arguably gave the Commissioner of Administration authority to set the amount of attorney registration fees⁵⁴ and to control other administrative details.⁵⁵

The court's opinion concentrates on the funding provisions of the statute. These provisions would have transferred to the general revenue fund a special statutory fund composed of attorneys' fees. A standing appropriation of the special fund to the court would have been eliminated and a general appropriation substituted in its place.⁵⁶ The court left unresolved an ambiguity in the statute's effective date,⁵⁷ the resolution of

in conjunction with state and district bar association ethics committees, for conducting disciplinary activities. Rules for Investigating Complaints Involving Professional Conduct of Attorneys and for Conducting Disciplinary Proceedings, 260 Minn. x (1961). The new law would have reduced the membership of the board from 19 to 15, increased the number of lay members from three to six, shortened members' terms, and provided a per diem allowance for "activity directly connected with board activity." These provisions were perhaps the most direct potential interference with the judicial power to control the practice of law, since control of the nature and membership of the agency responsible for disciplinary activities may afford indirect control of those activities. Any legislative influence in the actual disciplinary process would have been remote, however, as appointment of members and final decisionmaking remained solely in the hands of the court, where it had been since the first board of law examiners was set up by the legislature. See note 26 and accompanying text *supra*.

53. MINN. STAT. § 214.03 (1974). The supreme court stated without discussing the point that this section *required* the use of standardized tests. 296 Minn. at 421, 210 N.W.2d at 278. This interpretation is questionable, for the statute prescribes that all state boards "shall use" standardized tests "to the extent that such . . . tests are appropriate" and specifically exempts tests where knowledge of local law was important. This indicates that discretion was to be left to the licensing board. Moreover, the amicus brief of the Senate indicated that this section was not intended by the legislature to affect bar examinations. Brief for 68th Minnesota State Senate as Amicus Curiae at 7, *Sharood v. Hatfield*, 296 Minn. 416, 210 N.W.2d 275 (1973).

54. MINN. STAT. § 214.06 (1974). This section of the statute permits all licensing boards to raise statutory license fees with the approval of the Commissioner of Administration, and was designed to avoid the need for statutory amendment each time such a change was desired. Since attorney license fees were not set by statute, this section could have been interpreted as wholly inapplicable to attorney license fees. See *Petition of Respondents for Rehearing* at 29-31.

55. Minn. Laws 1973, ch. 638, § 64. This section gave the Commissioner authority to provide administrative support services to all the licensing boards. The court did not specifically discuss this section.

56. See note 57 *infra*.

57. The ambiguities as to the statute's effective date are somewhat complex. By one possible interpretation, the unexpended balance of the court's special fund would have been transferred on July 1, 1973, and

which could have permitted the court to avoid for as long as three years the impact of the funding provisions. The court apparently proceeded on the assumption that the legislature's mere attempt to manage the fund in *any* manner was an unconstitutional usurpation of judicial power regardless of the effect on the court's activities.

The court did not separately discuss the other provisions of the statute except in attempting to demonstrate that they created a justiciable issue because they conflicted with existing court rules.⁵⁸ The court treated these provisions in the aggregate in holding that "in so far as they apply to the judicial branch of government [the provisions of the law] are hereby declared to

since no general appropriation had been made to replace the fund prior to legislative adjournment, the courts' agencies would have been cut off without money for the July bar examination. See 296 Minn. at 427-28, 210 N.W.2d at 281-82. This impermissible result could have been avoided by construing the effective date of the funding provisions as July 1, 1976, in accordance with the Attorney General's opinion. Op. Att'y Gen. 83 (June 14, 1973). Given that effective date, the act's only impact would have been a future change in the appropriation mechanism; attorney fees would have gone into the general revenue fund, making the court's agencies financially dependent upon periodic legislative appropriations, as they had been prior to 1961. See note 50 *supra*. These alternative resolutions of the effective date of the statute might have produced different answers to the constitutional question, for a threat of imminent impoverishment clearly jeopardizes the independence of the judicial branch, while including funds for judicial activities in the general appropriation process might have no impact at all. The legislature could, of course, have arbitrarily refused to appropriate enough money for the court's activities once the change was made, but an assumption that it would do so would have been speculative. Numerous judicial activities have been financed by general appropriation and the legislature has never arbitrarily refused to appropriate funds. Brief for 68th Minnesota Senate as Amicus Curiae at 10-11, *Sharood v. Hatfield*, 296 Minn. 416, 210 N.W.2d 275 (1973).

The court's opinion appears at times to assume that financial harm was imminent, but since the court specifically declined to resolve the ambiguity in the statute's effective date, it is apparent that actual financial harm was irrelevant to the decision. The mere legislative attempt to handle "money held in trust" by the court, 296 Minn. at 420, 210 N.W.2d at 277, was beyond legislative prerogative irrespective of harmful or beneficial effects.

58. 296 Minn. at 421-22, 210 N.W.2d at 278. The respondents contended that no overt act interfering with the court's control over the practice of law had occurred. The court determined that since sections of the statute conflicted with court rules, a justiciable issue as to whether the court's power was curtailed was nonetheless created: "We need not wait until we are impotent to discharge our judicial duties before we assert our inherent power to preserve what is clearly a judicial function." *Id.* at 422, 210 N.W.2d at 278.

be an unconstitutional assumption of judicial power by the legislature."⁵⁹

The full implications of *Sharood* cannot be appreciated without examining the court's treatment of the "comity" theory. The court mentioned its general willingness to cooperate with the legislative branch,⁶⁰ noting its previous acceptance of legislation regulating "administrative procedures for admission and discipline of attorneys" so long as the court retained the power to make the "final decision."⁶¹ However, by failing to explain, or apparently even consider, how the statute impaired its functioning, the court appeared to ignore the spirit of cooperation it alluded to:

We have no doubt but what some of the provisions of [the statute] as they apply to the judiciary were well motivated, and upon adequate consideration it is entirely possible that the court may wish to adopt some the provisions by rule of the court. However, in so doing, we do not concede that their enactment was a permissible legislative prerogative.⁶²

If the comity theory is not utilized when legislative regulation is well motivated and reflective of what the court itself might do if it adequately considered the issue, it is difficult to imagine when the doctrine will be applied. *Sharood* thus not only holds that the legislature may not validly regulate the legal profession, but it also appears to negate the possibility of legislative influence in the matter.⁶³

II. A PRACTICAL ACCOMMODATION OF SEPARATED POWERS

The development of the doctrine of inherent judicial power to regulate the practice of law in Minnesota illustrates a steady

59. *Id.* at 429, 210 N.W.2d at 282.

60. *Id.* at 425, 210 N.W.2d at 280.

61. *Id.* at 424, 210 N.W.2d at 279. In fact, the court had in the past accepted legislation regulating substantive matters as well. See notes 25-26, 28-30 *supra*. It should be noted that none of the provisions in the statute at issue in *Sharood* deprived the court of the "final decision" to admit, disbar, or discipline an attorney.

62. 296 Minn. at 424-25, 210 N.W.2d at 280.

63. Several bills attempting to circumvent *Sharood* and reestablish some legislative control over the legal profession have been introduced. One would have created a legislative board to admit and regulate practitioners of law outside the courtroom, leaving admission and regulation of courtroom practitioners to the courts. S.F. 1052, 69th Legis. Sess. (1975). A more extreme proposal, for a constitutional amendment, would have prohibited attorneys from serving in the legislature, apparently on the premise that if attorneys are officers of the courts they should not be part of the independent legislative branch. S.F. 585, 69th Legis. Sess. (1975).

evolution away from the historical and logical origins of the concept. The Minnesota supreme court began by accepting and depending upon legislative enactments to regulate admission and disbarment; it then determined that statutory authorization was unnecessary because the power to regulate inhered in the court. This power in turn expanded to reach matters less directly related to the actual adjudicatory process, such as nonforensic lay practice and the administration of an organized bar. Finally, the court determined that inherent judicial power over the practice of law necessarily implied exclusive judicial power and, conversely, legislative impotence.

It is at this latter juncture—that connecting and equating inherent with exclusive judicial power over the practice of law—that the Minnesota court's reasoning becomes questionable. The court achieved the equation by resort to the assertion that its ability to execute its "fundamental functions of . . . the administration of justice and the protection of the rights guaranteed by the constitution . . ." is so dependent upon "the assistance and cooperation of an able, vigorous, and honorable bar" that the power to make rules governing the legal profession must be "exclusively reserved to the court."⁶⁴ The court premised this assumption of exclusive power on the doctrine of separation of powers, incorporated in the Minnesota Constitution. Thus, the court reasoned, "if it is a judicial function that the legislative act purports to exercise, we must not hesitate to preserve what is essentially a judicial function" by declaring the act unconstitutional.⁶⁵

This reasoning appears to contain two mistaken assumptions: first, that because the assistance and cooperation of attorneys are essential to the proper functioning of the courts, the courts, to ensure such assistance and cooperation, must exclude all legislative control of the practice of law; second, that the separation of powers doctrine justifies and indeed compels this result. The remainder of this Note will attempt to elaborate these criticisms and to propose an interpretation of the inherent powers doctrine more consistent with the policies underlying separation of powers and with the realities of the legislative and judicial functions.⁶⁶

64. *Sharood v. Hatfield*, 296 Minn. 416, 422-23, 210 N.W.2d 275, 279 (1973) (quoting *In re Petition for Integration of Bar*, 216 Minn. 195, 199, 12 N.W.2d 515, 518 (1943)).

65. *Id.* at 423, 210 N.W.2d at 279.

66. While the proposed interpretation will be discussed primarily

Any application of the separation of powers principle must take into account the reality that governmental power involves "vast stretches of ambiguous territory" that cannot be demarcated by "abstract, analytical lines," but rather require "practical exposition" that takes into consideration "necessary areas of interaction" between the branches of government.⁶⁷ Thus the scope and exclusivity of inherent judicial power to regulate the practice of law should be delineated by a pragmatic accommodation of the respective interests of the legislature and the judiciary in the particular matter to be regulated, not by a simplistic application of separation of powers to justify the conclusory assertion that because attorneys are essential to courts, only courts can regulate attorneys. This is not to deny constitutional significance to the delineation, but only to require recognition that the appropriate constitutional relations between judiciary and legislature in particular cases are not determinable by uncritical application of abstract theory.

The legislature, as the representative voice of the people, is charged with "the primary responsibility for adjusting public affairs."⁶⁸ The judiciary, on the other hand, is charged with resolving particular disputes, construing statutes and constitutions in the context of such disputes, and interstitially creating law in the common-law tradition. Legislative power over the practice of law should thus stem from the legislature's general interest in serving the public, while judicial power must stem from the need to assure that attorneys effectively aid the courts in deciding cases. If these premises are accepted, justification for denying legislative power can arise only from a reasoned analysis of how a particular piece of legislation interferes with the judicial function, not from a simple denial of power based on

with reference to regulation of the practice of law, the principles suggested are applicable as well to other areas in which inherent powers questions may arise. Indeed, in another context—compelling payment of public funds for judicial purposes—the Minnesota court itself has discussed the theoretical underpinnings of the inherent judicial power doctrine in terms similar to the text accompanying notes 67-69 *infra*. In *re* Clerk of Court's Compensation for Lyon County, 241 N.W.2d 781 (Minn. 1976). It is not clear whether the restrictive analysis utilized in the *Lyon County* case, wherein inherent judicial power is delineated in terms of "practical necessity," would be applied by the Minnesota court in the already well established and somewhat jealously guarded context of regulation of the legal profession.

67. Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1012-16 (1924).

68. *Id.* at 1016.

"mystical emanation[s] inhering in the unique nature of a court."⁶⁹

Virtually all courts claim the inherent judicial power to admit, supervise, and disbar attorneys and generally regulate the practice of law,⁷⁰ but most courts also recognize some degree of legislative power over the same subjects.⁷¹ Judicial opinions on this point, however, tend to be elusive, confusing, and copiously laced with dicta, so that identification of the theoretical source of the legislature's power is difficult. Some courts have taken a position similar to that of the Minnesota court, asserting that legislative regulation of the practice of law is effective only insofar as the court acquiesces in it, either as a matter of comity,⁷² or to avoid friction between the departments,⁷³ or because the legislation is a mere declaration of the court's inherent power, analogous perhaps to a codification of judicial opinion.⁷⁴ Other courts at times have asserted that legislative regulation of the practice of law is permissible if it "aids" the judiciary and does not interfere with or derogate judicial power and independence.⁷⁵ Still others have stated that the legislature

69. *Id.* at 1022.

70. See cases collected in Dowling, *The Inherent Power of the Judiciary*, 21 A.B.A.J. 635 (1935).

71. See Annot., 151 A.L.R. 617 (1944) (integration of the bar); Annot., 144 A.L.R. 150 (1943) (admission to the bar); Annot., 81 A.L.R. 1064 (1932) (same); Annot., 66 A.L.R. 1512 (1930) (same). A few courts hold that the legislature has plenary power to regulate the practice of law. *In re Applicants for License*, 143 N.C. 1, 55 S.E. 635 (1906); *In re Cooper*, 22 N.Y. 67 (1860).

72. *State v. Cannon*, 196 Wis. 534, 539, 221 N.W. 603, 605 (1928).

73. *Hanson v. Grattan*, 84 Kan. 843, 846, 115 P. 646, 647 (1911).

74. *Ratterman v. Stapleton*, 371 S.W.2d 939, 941 (Ky. 1963).

75. Courts use this language in several senses. Criminal statutes have been described as "aids": "The legislative department may pass acts declaring the unauthorized practice of law illegal and punishable. Such statutes are merely in aid of, and do not supersede or detract from, the power of the judicial department to control the practice of law." *People ex rel. Chicago Bar Ass'n v. Goodman*, 366 Ill. 346, 349, 8 N.E.2d 941, 944 (1937). "Aids" may also describe statutory enactments providing procedural machinery to render the court's exercise of power more convenient and effective. *In re Keenan*, 310 Mass. 166, 173-74, 37 N.E.2d 516, 521 (1941). Further, "aids" may mean substantive rules and regulations that do not thwart the court's own powers. *State ex rel. Reynolds v. Dinger*, 14 Wis. 2d 193, 203, 109 N.W.2d 685, 690 (1961).

Obviously this approach presents difficulties similar to those presented by the comity theory. See text accompanying notes 43-45 *supra*. It fails to identify with precision the standards or principles that determine what type of statutory assistance is constitutionally acceptable to the courts, and essentially requires a judicial "vote" to make a legislative act constitutionally valid.

may validly regulate the practice of law in the exercise of its police power to protect the public welfare, so long as it does not materially and unreasonably interfere with the judicial branch.⁷⁶

This last, "police power" theory most closely approximates the suggested pragmatic determination of the power of each branch in terms of its constitutional functions, for it recognizes that *both* legislature and judiciary have a legitimate interest in regulating the practice of law and thus possess the constitutional power to do so. The approach was well stated by the Missouri court in *Clark v. Austin*.⁷⁷

[Courts have] the inherent power to protect their own existence and functioning as constitutional courts, which includes the right to regulate the practice of law. They can make rules on that subject when there are no statutes, or supplementing statutes and imposing additional regulations. And they can strike down, as unconstitutionally usurping judicial power, any statute unreasonably encroaching upon, and therefore frustrating, their right to protect themselves. . . .

But it does not follow that the courts have the exclusive power to regulate the practice of law, or that they recognize legislation on that subject only out of comity. So far as is necessary to their self-protection the right of the courts is paramount or exclusive; but beyond that point the legislative department also has constitutional rights in the exercise of the police power. If the courts were lax and slothful in regulating the practice of law, it would hardly be contended lawyers would be left free to prey upon the public, because, forsooth, they are officers of the court, and that the legislative department would be helpless.⁷⁸

The legislature's police power over the legal profession follows from its acknowledged right to regulate other professional groups affected with a public responsibility.⁷⁹ Attorneys are

76. See, e.g., *In re Day*, 181 Ill. 73, 95, 54 N.E. 646, 652 (1899); *In re Bonam*, 255 Mich. 59, 61, 237 N.W. 45, 46 (1931); *Clark v. Austin*, 340 Mo. 467, 482, 101 S.W.2d 977, 985 (1937) (concurring opinion by majority of the court).

The police power of the legislature is sometimes recognized only insofar as the legislature seeks to set *minimum* admission standards, *In re Cannon*, 206 Wis. 374, 396, 240 N.W. 441, 450 (1932), and it is sometimes said that the legislature employs its police power in "aid" of the judiciary. *Wallace v. Wallace*, 225 Ga. 102, 109, 166 S.E.2d 718, 723 (1969). The theory developed in the text accompanying notes 77-94 *infra* is not intended to adopt these views of narrowly circumscribed legislative power.

77. 340 Mo. 467, 482 101 S.W.2d 977, 985 (1937) (concurring opinion by majority of the court).

78. *Id.* at 496, 101 S.W.2d at 994.

79. See, e.g., *Fowler v. Board of Registration in Chiropody*, 374 Mich. 254, 132 N.W.2d 82 (1965); *Hunstiger v. Kilian*, 130 Minn. 474, 153 N.W. 869 (1915).

not solely officers of the courts. They are businessmen and representatives of their clients, and they perform functions essential to all three branches of government.⁸⁰ It has been suggested, in fact, that attorneys should be subject to *more* regulation and supervision than other groups precisely because their conduct is so influential in shaping the "policies of the people."⁸¹ Since the legal profession affects the public in general at least as much as it does the operation of the judicial branch, the elected representatives of the people should have a voice in its regulation.

Further evidence of the legislative interest in regulating the profession can be found in judicial opinions themselves. Courts often cite maintenance of public respect for the administration of justice⁸² and protection of the public welfare⁸³ as policies bearing on the decision whether or not to regulate attorneys in particular respects. Judicial action taken in the name of those policies obviously suggests the need for public participation in formulating them. While the judiciary may properly exercise its inherent power to protect the public from the misdeeds of its officers where the legislature has not acted,⁸⁴ it seems that the public's representatives should be entrusted with predominant power over matters in which public respect and welfare are the primary concerns.

Furthermore, there may be some danger that exclusive judicial control of the bar will undermine public confidence in

80. On this basis one writer has questioned whether there should be *any* inherent judicial power to regulate attorneys. See Beardsley, *The Judicial Claim to Inherent Power Over the Bar*, 19 A.B.A.J. 509 (1933).

81. "The necessity for regulating the conduct of attorneys is apparent. It has been, throughout the ages, that the lawyers, in a large measure, shape the policies of the people. . . . Such being the case, the conduct of the lawyer should be a special object of consideration at the hands of each department of government." *State Bar v. McGhee*, 148 Okla. 219, 224, 298 P. 580, 585 (1931). See also *State Bar v. Superior Court*, 207 Cal. 323, 278 P. 432 (1929); *In re Scott*, 53 Nev. 24, 292 P. 291 (1930); *In re Gibson*, 35 N.M. 550, 4 P.2d 643 (1931).

82. One of the chief justifications for the anti-solicitation decisions was maintaining public respect for and confidence in the administration of justice. See, e.g., *In re Greathouse*, 189 Minn. 51, 248 N.W. 735 (1933).

83. Cases prohibiting the unauthorized practice of law are frequently justified on the ground of protecting the public. E.g., *Cowern v. Nelson*, 207 Minn. 642, 290 N.W. 795 (1940); see Comment, *Control of the Unauthorized Practice of Law: Scope of Inherent Judicial Power*, 28 U. CHI. L. REV. 162 (1960).

84. One commentator has suggested that the growth of the concept of inherent judicial power can be attributed in part to enthusiasm for reform of the bar in the face of legislative inaction. Note, *Admission to the Bar and the Separation of Powers*, 7 UTAH L. REV. 82, 88-89 (1960).

the court,⁸⁵ for such control might appear as selfish, politically motivated protection of the courts and the legal profession in general.⁸⁶ Certainly at least some issues concerning the practice of law can most appropriately be handled by the legislature, inasmuch as it is designed to ascertain and respond to the various competing demands of a broad public constituency.⁸⁷

But recognition of the legislature's power to regulate the practice of law should not be an acknowledgement of unrestrained power, for the unique position of attorneys as officers of the court—their essential role in the administration of justice—should impose limitations on legislative action. "Courts must have the authority 'necessary in a strict sense' to enable them to go on with their work"⁸⁸ and fulfill their primary constitutional function: to decide disputes, impartially and efficiently, free from undue external pressure. Legislative regulation that materially and unreasonably interferes with that function would appear unconstitutional under any interpretation of separation of pow-

85. See Beardsley, *supra* note 80, at 511:

The inherent power doctrine is detrimental to the courts, as well as to the bar, because it places a severe strain upon the standing of the courts with the public. Generally, the courts are not subjected to the public criticism which is incidental to controversial governmental matters, because the public understands that the function of the courts is simply to administer the law as it is, and that the courts have no direct responsibility for what the law is. This understanding of the nature of the judicial function is the foundation of the public's respect for the courts.

86. The dangers of judicial entanglement in political issues was expressed by Justice Frankfurter:

The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.

Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting). Justice Frankfurter was speaking of the Court's refusal to decide political questions in an adjudicatory capacity, but the reasoning applies with equal force to a court's need to remain as detached as possible in its regulatory functions. That regulation of the bar involves highly controversial and political issues is evidenced by the controversy surrounding advertising. See notes 1 and 2 *supra*.

87. In the course of rulemaking, the court or its agencies could of course seek public input by holding public hearings, but this does not rectify the problem of ensuring that the public has a representative vote in matters that are primarily of public concern. Furthermore, like any administrative agency, the court in its administrative capacity may be unduly influenced by the special interest group being regulated, here the bar. See Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 529-30 (1972).

88. Frankfurter & Landis, *supra* note 67, at 1022.

ers. Unlike "comity" or "exclusivity," however, this "functional" approach clothes properly enacted legislative regulations with a presumption of constitutionality and thus requires a specific showing of infirmity to invalidate them.⁸⁹ Concomitantly, under this approach the legislature may be able to cure the infirmity. It thus maintains broad legislative authority to regulate a profession whose activities profoundly affect the general welfare, while leaving unimpaired the ultimate authority of a court to protect its integrity and resist encroachment by a coordinate branch.⁹⁰

The approach suggested here would restrict the scope of judicial power asserted by some courts.⁹¹ The judicial branch could regulate the practice of law where the legislature had not acted, and, as generally pertains today, judicial and legislative regulation could exist concurrently. Where legislative and judicial regulations conflicted, however, the proper scope of each would be delineated in terms of the primary function of the respective branches; the legislature's interest in public welfare would control unless the regulation in issue unreasonably hampered the judiciary in the adjudicatory process.⁹²

One provision of the statute at issue in *Sharood* affords a good example of the way in which such an analysis might be

89. See, e.g., *State v. Target Stores, Inc.*, 279 Minn. 447, 467-68, 156 N.W.2d 908, 921 (1968).

90. "The sum total of this matter is that the Legislature may put reasonable restrictions upon constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions." *Brydonjack v. State Bar*, 208 Cal. 439, 441, 281 P. 1018, 1020 (1929). See also *Clark v. Austin*, 340 Mo. 467, 482, 101 S.W.2d 977, 985 (1937) (concurring opinion by majority of the court).

91. It is difficult to predict the practical effects of a reasoned application of this approach, for, as noted previously, courts often *speck* of exclusive judicial power while accepting legislative regulation. See notes 70-76 *supra* and accompanying text. Of course, the final decision as to the constitutionality of any given statute would necessarily remain with the court, and therefore the effectiveness of the theory in restricting judicial power would depend upon strict judicial adherence to the proposed standard. Adherence would be assisted by the presumption of constitutionality, which would at least require the court, before invalidating a statute, to specifically discuss how the statute impaired its operations or threatened its independence.

92. Traditionally, legislatures have tended to rely on judicial regulation of the legal profession, perhaps out of deference to the superior expertise of the judiciary and the advantages of unified control of the bar, Green, *The Courts' Power Over Admission and Disbarment*, 4 TEXAS L. REV. 1, 18 (1925); or because of reluctance to grapple with the constitutional limitations imposed by the courts on legislative power by means of the inherent power doctrine. For an example of a legislative attempt to regulate the bar that slowly died in committee because of

applied. The legislative determination that the public interest would best be served by lay membership on the attorney disciplinary board,⁹³ with appointment authority retained by the court, would be *prima facie* within the legislative police power. Since the court would retain authority both to appoint the board and to make the final decision as to whether to discipline particular attorneys, no interference with the court's operations would be apparent. Only if it could be shown that lay membership would unreasonably hamper the board's ability to investigate improper conduct and hence the judiciary's ability to rid itself of incompetent officers would invalidation of the statute be appropriate. The mere fact that the legislature had supplanted a court rule pertaining to attorneys would be insufficient cause for invalidating the statute.

The proposed analysis would similarly restrict judicial invalidation of statutes authorizing out-of-court lay practice, such as lay representation before administrative agencies or the "practice of law" by real estate brokers in connection with their business. In the case of lay representation before an executive agency, the only interference with the adjudicatory process would be the unlikely possibility that inadequate records might be produced and hamper judicial review on appeal.⁹⁴ Similarly, in the case of lay performance of such "lawyer-like" tasks as drawing up documents of conveyance, any impact upon the judicial branch would result only from a possible increase in litigation generated by lay incompetence. Neither interference would seem sufficiently substantial to warrant the judiciary overturning a legislative judgment that such lay practice is desirable.

By contrast, an example of unconstitutional legislation might be a statute abrogating the attorney's duty to disclose to the court legal authority known to her to be adverse to her client's position.⁹⁵ If permitted, such a statute would deprive the court of assistance of counsel in cases before it and thus directly affect the adjudicatory process.

The history of concurrent legislative and judicial regulation of the legal profession in Minnesota, and the relatively narrow

legislative concern with its separation of powers implications, see LaBelle, *New Disciplinary Rules for Michigan Attorneys*, 54 JUDICATURE 154 (1970).

93. See note 52 *supra*.

94. The federal government has commonly permitted the use of lay counsel in administrative proceedings, without any apparent increase in problems on review. See, e.g., *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379 (1963).

95. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(B) (1).

holdings of the cases before *Sharood*, would have permitted implementation of the proposed approach. However, *Sharood*'s denial of any legislative power to regulate the legal profession makes present adoption of such an approach highly unlikely. Moreover, in refusing to accept a statute that it suggested was reasonable, the *Sharood* court apparently precluded a comity approach to achievement of the goals suggested here.

Since the scope of the court's inherent power is a question of constitutional dimensions, a change in present Minnesota law can occur only through a modification of the court's position or by constitutional amendment.⁹⁶ Although a specific constitutional amendment readjusting the balance of power between the legislative and judicial branches is possible, this course of action presents serious difficulties. The judiciary requires broad discretionary powers to maintain its independence; an abstract compartmentalization of the subjects each branch would be permitted to regulate would be too limiting and inflexible.

The most practicable means of restoring needed legislative influence over the legal profession would be a change in the court's position.⁹⁷ Although acknowledgment of the legislature's right to regulate in this area would be the most desirable change, even a return to the wise exercise of judicial discretion through comity would at least remove the chilling effect of *Sharood* and encourage legislative assistance in regulating the practice of law. Careful attention to good faith legislative enactments and the reasons underlying them coupled with explicit, detailed consideration of how such enactments affect the judicial branch could do much to restore harmony and balance between the two branches. After all, the goals of both are the same: "the good of the people in the administration of justice."⁹⁸

96. It must be noted that several state constitutions specifically entrust the power to regulate attorney conduct and the practice of law to the judiciary. See, e.g., ARK. CONST. amend. XXVIII; FLA. CONST. art. 5, § 23; N.J. CONST. art. 6, § 2, ¶ 3.

97. But cf. note 66 *supra*.

98. *Clark v. Austin*, 340 Mo. 467, 497, 101 S.W.2d 977, 994 (1937) (concurring opinion by majority of the court).